BEFORE TEE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. 85A-684-SW
JOSEPH BARRY CARROLL)

For Appellant: Mitchell S. Halpern
Bob Woolf Associates, Inc.

For Respondent: Lazaro L. Bobiles
Counsel

O P I N I O N

This appeal is made pursuant to section 18593[1] of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Joseph Barry Carroll against proposed assessments of additional personal income tax in the amounts of $5,175 and $5,065 for the years 1981 and 1982, respectively.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the years in issue.

Appeal of Joseph Barry Carroll

The issue presented in this appeal is whether appellant has shown that respondent has incorrectly allocated appellant's income based on the presumed number of "duty days" that appellant performed personal services in California.

Joseph Carroll is a nonresident taxpayer who has appealed respondent's determination of his California-source income for the taxable years in issue. During 1981 and 1982, appellant was employed as a professional basketball player with the California-based Golden State Warriors. He reported his California salary received from the Golden State Warriors according to the ratio that games played in California bore to total games played. For the 1980-81 season, 38 of 71 games were played in California and for the 1981-82 season, 41 of 82 games were played in California. Appellant accordingly allocated 53 percent of his salary to California for 1981 and 50 percent of his salary in 1982.

Respondent, in determining appellant's California salary on the basis of total days during which appellant performed personal services in California, used its Audit Ruling 125.1. Respondent presumed that appellant was required to perform personal services not only for playing in games, but also for participation in training camp, practice sessions, and team travel.[2/] Respondent concluded that appellant's duty days in California for the 1981-82 season totalled 140, or 73 percent of all duty days. For the 1982-83 season, the duty days in California totalled 146, or 70 percent of duty days everywhere. Based on these percentages, respondent issued proposed assessments. Appellant protested contending that the allocation should be made based only on the number of California games compared to the total number of games played. When respondent affirmed its proposed assessments, this timely appeal resulted.

It is a well-established rule that respondent's determinations as to issues of fact are presumed correct and the taxpayer has the burden of proving such determinations erroneous. (See, e.g., Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949) This presumption is rebuttable and will support a finding only in the

2/ Audit Ruling 125.1 defines duty days for basketball Flayers as including all days from the beginning of club training sessions through the last game in which the team competes.

absence of sufficient evidence to the contrary. (Wiget v. Becker, 84 F.2d 706 (8th Cir. 1936); Appeal of Janice Rule, Cal. St. Bd. of Equal., Oct.6, 1976.) Respondent's determinations can be successfully rebutted., however, only if the taxpayer presents credible, competent, and relevant evidence as to the issues in dispute. (Appeal of Oscar D. and Agatha E. Seltzer, Cal.. St. Bd. of Equal., Nov. 18, 1980.)

For purposes of the California Personal Income Tax Law, gross income in the case of a nonresident taxpayer includes only the gross income from sources within this state. (Rev. & Tax. Code, § 17951.) Where a nonresident taxpayer has gross income from sources. both within and without this state, his gross income will be allocated and apportioned. (Rev. & Tax. Code, § 17954.) The definition *of gross* income includes compensation for services. (Rev. & Tax. Code, § 17071, subd. (a)(1).) Consequently, income received by a nonresident taxpayer for personal services performed wholly in California constitutes gross income from sources within this state and is entirely taxable by this state without having to be apportioned. (Appeal of Oscar D. and. Agatha E. Seltzer, supra; Appeal of William Harmount and Estate of Dorothy E. Harmount, Deceased, Cal. St. Bd. of Equal., Sept. 28, 1977.) On the other hand, if a nonresident taxpayer is employed in this state at intervals during the yea:, compensation received for personal services will be apportioned on such manner as *to* allocate to California that portion reasonably attributable to services rendered in this state. (Cal. Admin. Code, tit. 18, reg. 17951-5, subd. (b).)

In the case of a nonresident professional athlete who periodically plays in California, any portion of his salary which represents compensation for services rendered to his team will be apportioned to this state by a working-day formula which takes into account the number of duty days spent in California and total duty days during the season. (See FTB AR 125.1, Sept. 1977; Appeals of Philip and Diane Krake, et al., Cal. St. Bd. of Equal.; Oct. 6, 1976; Appeal of Dennis F. and Nancy Partee, Cal. St. Bd. of Equal., Oct. 6, 1976.) Respondent in establishing the number of duty days appellant spent in California 'included the days spent in practice sessions, training camp, and team travel. Appellant objects to the use of a '*duty-days" or a "working-days" formula and supports the use of a "games-played" formula.

Respondent's basis for using appellant's working days in California is well established. (Appeal of Dennis F. and Nancy Partee, supra.) As was held in the Partee appeal, we have rejected the argument that professional athletes are paid only for playing in their respective games. They are also paid for practicing and traveling and are generally fined if they do not appear at the practice sessions. The term "working day", therefore, includes all days on which the player's team practices, travels, or plays, beginning with the first day of the club's training sessions and extending through the team's last game. We have held that it is quite plausible to assume that a portion of a player's salary represents compensation for non-game activities. (Appeal of Dennis P. and Nancy Partee, supra.) Appellant continues to contend that he was not compensated for practice and travel days; however, he has failed to present any evidence that he was compensated only for the games he played. Appellant further alleges that he was not paid for his "off" days during the season. While this allegation might very well have merit if proven, appellant has not documented how many "off days"' he had and that, in fact, he was not compensated for them, A complete copy of his contract which could substantiate his position has not been presented. As appellant has *not* carried his burden of proving that respondent's determination is incorrect, the action of respondent must be sustained.

Appeal of Joseph Barry Carroll

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefot,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Joseph Barry Carroll against proposed assessments of additional personal income tax in the amounts of $5,175 and $5,065 for the years 1981 and 1982, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 7th day of April, 1987 by the State Board of Equalization, with Board Members Mr. Collis, Mr. Dronenbcrg, Mr. Carpenter and Ms. Baker present.

Conway H. Collis, Chairman

Ernest J. Dronenburg, Jr., Member

Paul Carpenter, Member

Anne Baker*, Member

, Member

*For Gray Davis, per Government Code section 7.9